JD(ATL)–13–15
Owingsville, KY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA OFFICE

CUSTOM FOOD PRODUCTS, LLC,
A WHOLLY OWNED SUBSIDIARY OF
CTI FOODS, LLC

and **Case 09-CA-144165**

UNITED FOOD & COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 227

Joseph F. Tansino, Esq. and
Erik Brinker, Esq., for the General Counsel.
William J. Kishman, Esq. (Bingham,
Greenebaum & Doll, LLP), of Louisville,
Kentucky, for the Respondent.

DECISION

Statement of the Case

Keltner W. Locke, Administrative Law Judge: An employee gave management a letter announcing that she was engaging in union activities. This action neither immunized her from being supervised nor made it illegal for management to correct her work-related mistakes. Therefore, I recommend that the complaint be dismissed.

Procedural History

This case began on January 9, 2015, when the United Food and Commercial Workers International Union, Local 227 (here called the "Union" or the "Charging Party") filed an unfair labor practice charge against Custom Food Products, LLC, a wholly-owned subsidiary of CTI Foods, LLC (the "Respondent"). The Board's Cincinnati Regional Office docketed this charge as Case 09–CA–144165 and began an investigation. On January 16, 2015, the Union amended the charge.

On March 19, 2015, the Acting Regional Director, pursuant to authority delegated by the Board's General Counsel (here called the "General Counsel" or the "Government"), issued a

complaint and notice of hearing. The Respondent filed a timely answer.

On May 20, 2015, a hearing opened before me in Mt. Sterling, Kentucky. The parties called witnesses and adduced testimony on that day, on May 21 and 22, 2015. After both sides rested, I adjourned the hearing until July 9, 2015, when it resumed by telephone conference call. Counsel presented oral argument and then the hearing closed.

Admitted Allegations

Based upon admissions in the Respondent's Answer and stipulations during the hearing, I conclude that the government has proven the allegations raised in complaint paragraphs 1(a), 1(b), 2(a), 2(b), 2(c), (3), 5(a), 5(b), and the portions of complaint paragraph 4 described below. More specifically, I find that the charge and amended charge were filed and served as alleged. Additionally, I conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it is consistent with the Board's standards to assert jurisdiction in this matter.

Complaint paragraph 4 alleges that certain named individuals are Respondent's supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act. Respondent's answer denies these allegations. However, based on the Respondent's stipulations at hearing, I find that, at material times, Plant Vice President Jon Hickerson, Director of Human Resources Dan Monrreal, Plant Human Resources Manager Sally Porter and Customer Services Supervisor Jason Morton were Respondent's supervisors and agents within the meaning of Section 2(11) and (13), respectively.

The Respondent has admitted, and I find, that it issued written warnings to employee Kelly Arvin on November 17, 2014, and December 13, 2014, as alleged in complaint paragraphs 5(a) and (b). The Respondent denies that it thereby violated the Act, as alleged in complaint paragraph 6. The legality of those warnings will be discussed below.

Unfair Labor Practice Allegations

The complaint in this case raises only two unfair labor practice allegations, specifically, that Respondent violated Section 8(a)(3) and (1) of the Act by issuing written warnings to employee Kelly Arvin on November 17, 2014, and December 13, 2014. Arvin, who began work for Respondent in 2009, resigned her employment on April 27, 2015, but the government does not allege this resignation to be a constructive discharge.

Before discussing the alleged unfair labor practices, it will serve clarity to begin 2 years earlier when CTI Foods bought Custom Food Products, which operated a relatively small food processing plant in Owingsville, Kentucky. The buyer and seller closed the transaction on December 31, 2012. Two different corporate cultures then began to converge with the slow-motion inevitability of ship and iceberg.

The new owner, CTI Foods, LLC, planned to enlarge the Owingsville, Kentucky plant into a major facility which could expand the company's sales into a large new territory. This plan entailed a more than threefold increase in plant size—from 58,000 to 198,000 square

feet—and tripling the employee complement from 146 to almost 500.

However, the expansion plan involved more than merely adding floor space and workers. The new owners intended to improve productivity by changing methods and processes. They brought in the kind of specialist who used to be called an "efficiency expert" to study, report, and recommend. From the outset, the presence of this efficiency expert, Mitch LeBrasseur, generated conflict and controversy.

Not all local managers felt comfortable with the changes being imposed on them from outside, and LeBrasseur personified those changes. He arrived from outside, sent on a mission by the new corporate owners: Identify processes and procedures which should be changed.

Management did assign a local supervisor, Gregory Webb, to spend part of his workday assisting LeBrasseur, but Webb himself was something of an outsider. He only had been at the Owingsville plant a few months. Previously, Webb had worked for a large corporation in the Chicago area, and his perspective more closely resembled LeBrasseur's than that of local management.

The mission of this "continuous improvement team"—LeBrasseur and Webb—required disrupting existing methods and replacing them with more efficient procedures. Webb testified that "the old way or what we were trying to improve on was everything is done by paperwork, written down by the operator, handed into the accounting person or personnel. . ." Respondent replaced the paper-based method with a computerized accounting and management system called Macola.

Along with the new methods came higher expectations that employees would work together smoothly and respond rapidly to customer needs and concerns. All of these changes—the expansion of plant and workforce, the use of computers to replace paperwork, the heightened expectations of management and the increased demands on employees—combined to create a stressful, high pressure work environment. It produced the kind of unsettled feeling which might result if the purchaser of a major league baseball club told the team members that, henceforth, they would be playing ice hockey.

Although the "game change" was not as extreme as that analogy, it did generate stresses which affected both rank-and-file employees and managers, albeit in different ways. Some hourly employees began thinking about union representation. At the same time, the change divided the managers into two categories, those who embraced the new way and those who resisted it.

Some testimony suggests that the efficiency expert and his assistant may have widened this fissure. Their mission essentially entailed finding fault with existing production methods, which meant that they not only were bringing change but also criticism. Their success therefore depended not only upon expertise in production but also upon more diplomatic finesse than they apparently possessed.

The record suggests that, whatever their true intentions, LeBrasseur and Webb manifested disdain for the plant manager, Tony Walker. Indeed, Respondent's vice president, Jon Hickerson, testified that, in his view, LeBrasseur and Webb were trying to get Walker fired.

Another, related bone of contention arose from the continuous improvement team's seeming unwillingness to share its observations and recommendations with local management. LeBrasseur's mission involved looking for inefficiencies but, according to Hickerson, when LeBrasseur found such problems he reported them to corporate level management, leaving local management out of the loop. If LeBrasseur had really wanted to make the plant more efficient, Hickerson believed, he would also have disclosed his findings to plant-level managers so they could make the changes more quickly.

Eventually, the Respondent discharged both LeBrasseur and Webb. However, LeBrasseur's termination cannot easily be interpreted as a victory of local management in opposing change from above, because some local managers, including the plant manager, also met the same fate. Respondent's vice president, Hickerson, testified as follows about the departures of Plant Manager Tony Walker and Plant Human Resources Director Sally Porter:

> Q. Where is—is Tony Walker employed by CTI today?
> A. No, he's not.
> Q. And what happened with him?
> A. We just got to a point where I felt his management was ineffective and we needed to make a change, and we mutually agreed that he would leave the Company.
> Q. Who initiated that process of him leaving the Company?
> A. I did.
> Q. And where is—is Sally Porter employed by CTI today?
> A. No, she is not.
> Q. And why is that?
> A. Again, as the facility continued to grow, it felt like she was not effective in managing all of the human resources responsibilities, and she made the decision to retire.

Hickerson also testified that he replaced a quality assurance manager because "it was apparent that with everything that was going on, [she] was not going to be able to handle all the complexity." The record suggests that in this instance, the manager was reassigned to other work rather than discharged.

Hickerson also believed that the human resources department "needed to do things differently." He saw too much inconsistently in the compensation employees received:

> [W]hat I noticed was when people would change positions, then human resources may or may not accurately reflect what the position was that the person was going to. And I was not happy about that. We had a lead who voluntarily asked to step down from that position. When he went back to his former position, the plant manager was trying to be nice and said, hey, the pay

stays the same, but that pay structure was outside of the established pay matrix,

Hickerson testified that he gave this employee the choice of returning to the lead position and keeping his current pay level or staying in the nonlead position at a lower pay rate. The record suggests that some employees, including logistics coordinator Kelly Arvin, considered this action unfair. In fact, she testified that it was "pretty much the final straw" which made her decide to organize a union. Arvin obtained authorization cards from the Charging Party and solicited employees to sign them.

At one point, apparently before she began distributing union cards, Arvin and several other employees had a discussion with Arvin's immediate superior, Gregory Webb, who continued to perform his regular work as logistics supervisor while also assisting LeBrasseur.[1] Arvin and the other employees explained their concerns about management's decision to reduce the pay of the former lead employee. According to Arvin, Webb, who had worked for a larger, unionized employer, said that he felt a union "was needed at this company."

The record does not reveal how often Arvin discussed unionization with Webb, but clearly it was more than once. However, Webb did not report this information to Plant Manager Walker or Vice President Hickerson. Instead, he shared the information only with Mitch LeBrasseur.

As logistics supervisor, Webb reported directly to Plant Manager Tony Walker, his immediate superior in the chain of command. [2] Based on the testimony of Hickerson, which I credit,[3] I find that Webb did not get along with Walker. The record does not establish whether or not Webb was trying, as Hickerson suspected, to get Walker discharged, but my observations of Webb while he testified lead me to conclude that he was quite confident of his own management talent and might well have acted as if independent of Walker's oversight. In August 2014, Webb had received an oral reprimand for failing to tell Walker that on a particular day he would be coming to work later than usual and spend most of his working time on the second shift.

As noted above, after learning about the union organizing effort, Webb did not tell either Walker or Hickerson, instead mentioning it only to LeBrasseur. When Hickerson finally learned about Webb's failure to report the matter through the regular chain of command, he considered it a serious breach of Webb's duty as a supervisor. The failure placed Hickerson and Walker in a potentially embarrassing position because higher management knew what was

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[1] As logistics supervisor, Webb oversaw from 17 to 20 employees. Webb estimated that he continued to spend 75 to 80 percent of his working time performing these regular supervisory duties and the remaining 20 to 25 percent assisting LeBrasseur on the "continuous improvement team."

[2] Webb testified that he had only a "dotted line" relationship with LeBrasseur, an apparent reference to an organization chart showing the chain of command.

[3] In general, Hickerson's testimony does not conflict with Webb's, but to the extent the accounts differ, my observations of the witnesses lead me to credit Hickerson's, which particularly impressed me as straightforward. Moreover, one difference between Webb's testimony and his prehearing affidavit affects my assessment of his credibility. Webb testified that on October 20, 2014, after he had been asked to wait outside Hickerson's office, he left the waiting area because he had received a message on his two–way radio, and to telephone LeBrasseur. However, Webb's prehearing affidavit made no mention of the radio message.

happening at their plant before they did.

Moreover, to Hickerson, this failure to report was just the latest instance in a troubling pattern of Webb and LeBrasseur telling corporate officials of problems at the plant while leaving the local managers in the dark. Additionally, this failure to report was consistent with Hickerson's suspicion that Webb and LeBrasseur were trying to undermine the plant manager. Specifically, Hickerson testified that he suspected they had withheld information about the union effort to make Walker look bad in the eyes of higher management, "[b]ecause what Mitch [LeBrasseur] told me was the rumor he had heard was that the reason folks were even considering it was because Tony was a poor manager."

Around October 20, 2014, Hickerson became aware of the magnitude of the failure to report. Previously, LeBrasseur had told Hickerson simply that he had heard a "rumor" about employees trying to organize a union. However, sometime around October 20, LeBrasseur provided Hickerson with considerably greater detail.

Because LeBrasseur did not testify, uncertainty remains concerning the reason he gave Hickerson more information about the union organizing effort, but the testimony of Webb and Arvin suggests the following sequence of events. The union organizer who provided Arvin with authorization cards also gave her advice, including the suggestion that she place the Respondent on notice that she was engaging in protected activities. The union organizer gave Arvin a pattern "Section 7 letter" which Arvin could customize and present to Respondent's vice president or other high ranking manager. Arvin then went to her supervisor, Webb, to ask his assistance in setting up such a meeting with Hickerson.

Webb, testified that he then sought advice from LeBrasseur: "Basically, I had went back to Mitch to say, hey, this is what she's telling me, what do you advise that she do. And basically Mitch responded back to say schedule a meeting with Jon, invite all the managers, make sure she's got witnesses." Webb's conversation with LeBrasseur took place on October 20, 2014, the same day that LeBrasseur surprised Hickerson with the additional information about the union organizing effort. In the absence of testimony by LeBrasseur, his reason for speaking with Hickerson about the organizing effort remains uncertain, but it appears plausible that he was trying to set up a meeting between Hickerson and Arvin.

In ay event, the additional information which LeBrasseur provided to Hickerson indeed surprised him. Hickerson described his reaction to LeBrasseur's disclosure as "wow, this is a whole lot more than what you told me before, which was this was just a rumor." At that point, according to Hickerson, "he told me that Greg Webb was the one who had told him, so I wanted to meet with Greg Webb and find out what's going on."

Hickerson summoned Webb to his office, where the meeting took place. The corporate-level senior director of human resources, Dan Monrreal, participated by telephone. Although Monrreal did not testify, Hickerson and Webb provided accounts of the meeting which are similar in many respects. Based on my observations of the witnesses, and for additional reasons noted below, to the extent that Hickerson's testimony conflicts with Webb's, I credit Hickerson.

According to Hickerson, Monrreal asked Webb why he had not communicated "any of this"—presumably meaning information about the union organizing drive—to Plant Manager Walker. When Webb replied that he had a lot of reasons not to talk to Walker, Monrreal asked Webb why he had not told Hickerson. According to Hickerson, whom I credit, Webb agreed that he "probably should have done that."

Hickerson then asked Webb to wait outside his office while he conferred with Monrreal privately. Hickerson would then have Webb come back into the office.[4] However, when Hickerson came to get Webb, he was not there. Hickerson decided to discharge Webb and did so. The General Counsel does not allege that Respondent violated the Act by terminating Webb's employment and the complaint alleges Webb to have been a supervisor. However, the General Counsel does argue that Respondent's discharge of Webb demonstrated antiunion animus. For reasons discussed later in this decision, I find that Hickerson was not motivated by antiunion animus when he discharged Hickerson.[5]

After his discharge, Webb spoke with Arvin, who decided to submit the "Section 7 letter" to Hickerson. Accompanied by some other employees who served as witnesses, Arvin delivered the letter to Hickerson as he was coming out of his office. The letter stated:

> Dear John,
>
> I, Kelly Arvin, intend to exercise my section seven rights under the National Labor Relations Act to form, join or assist any union of my choosing.
>
> I will be lawful in the exercise of my rights and hope you will do the same. Any problems you have with the way I intend to exercise my rights feel free to respond in writing so we can both keep a record of the exchange. I hope you will be respectful of my decision even though you may not feel the same way I do about my choice.
>
> Respectfully,
>
> /s/ Kelly Arvin

In handwriting below her signature Arvin noted "given to John Hickerson @ 3:00 p.m.

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[4] Hickerson's testimony about what he said to Webb leads me to believe he was punctilious about testifying accurately. He initially testified that he told Webb to wait outside and "I would call him back in just a couple of minutes." However, Hickerson immediately corrected himself by adding "I didn't give him a timeframe. I just said, wait outside and I will come and get you." This unprompted correction is consistent with my impression that Hickerson was attentive to the duty to testify accurately and tried to avoid exaggeration.

[5] To the contrary, I conclude that Respondent discharged Webb because, during his 6 months of employment, he had proven himself to be a "loose cannon" who disregarded orders. Hickerson testified: "I think Greg was determined to do what Greg wanted to do and regardless of instructions he was given." More than that, Hickerson believed that Webb and LeBrasseur were going about the "continuous improvement" work in a manner which caused needless turmoil. Hickerson did not have authority to discharge LeBrasseur, but he did persuade higher management to take action.

on 10/20/14 witnessed by. . .” followed by the names of 5 individuals.[6] Arvin testified as follows regarding her giving the letter to the Respondent's vice president:

> Q. So please take the Court through the process of how you delivered the letter to Mr. Hickerson.
> A. [Union Organizer] Betty Johnson had advised me to gather some witnesses. So as soon as Greg called me and told me he had been terminated, I printed this out. I took it directly to the front office, and I collected these witnesses that are listed, and delivered this to Jon Hickerson as he was coming out of his office.
> * * *
> Q. BY MR. TANSINO: After you handed the letter to Mr. Hickerson, what happened next?
> A. The rest of the employees were dismissed.
> Q. Well, let me stop you there. Who dismissed the employees?
> A. Jon Hickerson.
> Q. So who was left?
> A. It [w]as Jon Hickerson and Tony Walker. Jon Hickerson advised us to go into his office. He collected Sally Porter. He made a copy of this document for me to have, and then he also scanned the document to Dan Monrreal, I believe is his last name, who is the Company's human resource director. He then called Dan on the speakerphone and had him open his e-mail. He read it. And Dan informed me that I, indeed, had the right to form a union. He advised me that I should know the law, what I could and couldn't do, and I advised him the same.
> Q. How long did the meeting last?
> A. Maybe 10 minutes, if that.
> Q. How did the meeting end?
> A. We hung up on the conference call, and I was released. And as I was walking out the door, Tony Walker stopped me, asked me about a load that was due in earlier that was holding up our production. And I answered him. And I turned around and asked him if they would like the door open or closed, and they told me to close the door.

Three days after this October 20, 2014 meeting, Monrreal sent the following email to Hickerson:

> Jon
>
> I will be in KY next week Tuesday thru Thursday morning. I would like to do

[6] Three of the listed witnesses were employees. A fourth person, Kenny McDaniel, was Plant Operations Manager Kenny McDaniel. The other listed name was “Tony Walke,” which appears to be an inadvertent misspelling of the name of the plant manager, Tony Walker. Although Respondent later removed Walker from that position, nothing in the record suggests that a reason for the removal was that Walker was present when Arvin gave Hickerson the letter. The government does not contend and the record would not establish that Respondent took any action against any of the five individuals because they accompanied Arvin or witnessed Arvin giving the letter to Hickerson.

the following:

- Meet with you and Tony and recap where we are at with Kelly and what are the nest steps we need to follow.

- Meet with the exempt management team. I want to go over basic union avoidance topics. This will not be a full blown session. I need about 20 minutes to go over high level do's and don'ts and make sure they get the story of what is going on. Also need to get their feedback on what they are hearing and suggestions they have.

- Meet briefly with the employees in large groups either before or after the shift or whatever process works best. I would say 5 no more than 10 minutes. It would be you, me and Tony. What we need to say is 'Thank You" for all they have done to help us get Started, admit there has been a great deal of pressure lately to get started up and thank them for their understanding, patience and focus on getting the needed job done. Also reinforce that if they have issues, problems, concerns we will listen to them, are available to listen to them and will do everything we can to address the issue they have. We want to hear from them.

Let me know your thoughts.

Thanks

Dan

The next-to-last sentence of Monrreal's email, indicating that Monrreal intended to tell employees, or have either the vice president or plant manager tell employees, that "they are available to listen to them and will do everything we can to address the issue they have," raises the possibility that Monrreal was considering a statement to employees which could be considered a solicitation of grievances. Whether or such a statement violated the Act would depend on the precise wording and context.

However, the General Counsel has not alleged that Respondent violated Section 8(a)(1) by soliciting grievances. In fact, the General Counsel has not alleged that the Respondent committed any violation of the Act except by issuing the November 16, 2014 and December 13, 2014 warnings to Arvin. The record does not include any evidence indicating that Respondent made any violative statement to employees and I find that it did not.

On November 17, 2014, the Respondent gave Arvin the following written warning. which did not refer in any manner to Arvin's union activity:

Reason for Disciplinary Action: Work Performance

A---'s[7] pricing:

You are responsible for publishing the required information for CTI Foods to publish monthly pricing to A---'s in a timely manner. Failure to complete this job duty has the potential to cause the company significant monetary loss.

Beginning on at least October 15, 2014 Jeff Golangco began requesting the pricing information that is sent to Kitty Chu. Not until the morning of 11/17/14 was the pricing completed. There were several emails sent inquiring about the pricing information. On 11/7/14 you sent an email that you were working on them and would be coming in on Saturday 11/8/14 to "work on nothing but the Arby's worksheets." Yet, you didn't send another update to Kitty until 11/11/14.

The pricing spreadsheets were not completed and sent to Kitty until the morning of 11/17114. This has to change, we cannot let these drag out so long and not be completed until the day they are due to be published to A---'s. Jeff sent you a timeline of when these need to be done, it needs to be followed.

CHEP Pallet reporting:

On 11/13114 Greg Mills with H-------- sent an email inquiring about CHEP pallet outbounds and wanted to get a weekly report. Your response was, "If time permits, I will do the best I can." This is an unacceptable answer to a customer request.

If you are not sure that you can comply with a customer request, you need to talk to either your supervisor, or in this case Eric Jones as he is the person handling communications with W--------.

At no time are you to tell a customer you will do something If you have time.

Import loads from S-----:

On 11/15/14, Bob Chudy sent you an email regarding 2 loads of imported beef that needed to be pulled out of storage before we incurred storage costs. Per his note those loads had already been sitting there for 3 weeks. You responded on 11/7/14 that they had been moved to our account before you could get a truck in there.

Tom Lawson spoke to you about the importance of getting these loads moved out in a timely manner to avoid additional storage charges. 3 weeks is more

[7] During the hearing, the Respondent's counsel expressed concern that its customers would be identified in testimony and exhibits and there would appear to be no compelling reason to do so. Therefore, I have redacted those names and substituted the beginning letter of the customer's name followed by a dash.

> than enough time for you to accomplish this task. As a result of you not moving these loads we incurred in/out charges and a month's storage cost.
>
> Other than the CHEP reporting, these are tasks that you have been doing for quite some time. There shouldn't be any reason that these tasks couldn't be completed In a timely manner.
>
> Failure to complete these tasks as directed will result in further disciplinary action up to and including termination.

Respondent's vice president, Hickerson, and Plant Human Resources Manager Porter signed the warning but Arvin refused to sign. However, in her testimony, Arvin did not deny the problems described in the warning. For example, she gave the following explanation for taking more than a month to provide the pricing information which had been requested on October 15, 2015:

> As I stated before, my workload had tripled. I was having a hard time performing every task that needed to be done. The Company A pricing is a tedious Excel worksheet. There's many tabs on it that require information. Basically, I would input our incoming, our inbound raw material, the cost, and then I would have to enter the production as well. The raw material receivings that I received, since I was not able to go on and enter them into the spreadsheet, I made copies and forwarded those onto the other people that needed it so as not to hold their job up. And when I found time to work on them, I did the best I could with the workload that I had.

Arvin's testimony that she was "having a hard time performing every task that needed to be done" does not dispute that her work was unsatisfactory but rather supports that conclusion. Her testimony concerning the second subject mentioned in the warning—the CHEP pallet reporting, also does not deny that her work performance fell below the Respondent's expectations. Significantly, Arvin did not deny that when a customer asked for weekly reports, she replied "If time permits, I will do the best I can." Moreover, her testimony suggests that, even at the time of hearing, she did not share management's view that such a remark manifested a lack of concern for the customer's needs and was seriously inappropriate:

> Q. . . .I want to move onto the next item here, the CHEP pallet reporting. Would you describe that and what your job duties were with respect to CHEP pallet reporting?
>
> A. CHEP pallets are special pallets. They're extra sturdy. They're expensive. We receive these in on our raw material loads. The only time that we dealt with CHEP initially was with Company C. And I would have to keep up with the inventory. I would go into CHEP pallets SAP system, their inventory system, and report where we shipped these pallets to. When we started business with Company H, they also required the use of CHEP pallets. However, trying to get into their system was completely different. Their reporting system was completely different than Company C's reporting system. So when I had tried, I couldn't get in and do as I

needed to do. I know they kept asking about there weren't that many loads that had shipped.

Q. I'm sorry, who is they?

A. Well, Company H. They were wanting to keep track of their inventory. I normally reported those monthly to Company C. Company H requested that they wanted them I guess weekly. *And I responded that I would if time permits*. I was under time constraints trying to get everything else done, that I would do the best I can. *And evidently they felt that was not an appropriate answer*. [Italics added]

On December 15, 2014, in a meeting in Hickerson's office, Arvin received another written warning, this time designated a final warning. Besides Hickerson and Arvin, also present were Senior Director of Human Resources Dan Monrreal, Plant Human Resources Manager Sally Porter, and Human Resources Administrator Jennifer Carpenter. The warning Arvin received stated (with customer names partially redacted, as above) as follows:

December 13, 2014

Re: Kelly Arvin Final Written Warning

On November 17th, 2014, Kelly Arvin was given a written warning for work performance. (See attached)

There were three specific areas of deficiency that were addressed at that time, one of them being her failure to properly respond to a request by H-------- to update the CHEP pallet inventory in a timely manner.

On November 13, 2014, Kelly received an small from Greg Mills at H-------- asking if we were producing product yet because he had seen no outbound reconciliations related to CHEP pellets. Kelly responded that we were producing and that she would submit a report at the end of the month. Greg then asked for this to be done weekly instead.

Not until November 22nd, 2014, did Kelly attempt to access the CHEP site to reconcile and report outbound shipments. At that time she sent an email to Greg Mills, among others, stating that she was having technical difficulties accessing the required fields.

On November 24th, 2014, Jim Parsell with CHEP responded to Kelly's email with instructions on how to enter that required information. He also offered to schedule online training to further assist her in the process.

On December 4th, 2014 1 followed up with Jim Parsells to confirm that any technical issues Kelly had were resolved. I was informed that she had never contacted anyone for further follow up after the November 24th, 2014 email.

On December 5th, 2014 1 received an email that the CHEP reconciliation still had not been done so I asked Rayla Francis to complete the task.

As of December 13, 2014 Kelly still has not done any ClIEP reconciliations and we have had to have someone else do them.

In summary, even though Kelly was talked to about this on November 16th, 2014, she has failed to take any action to complete this task.

In addition to this issue Kelly has also failed to complete the A---'s pricing information in a timely manner. She was counseled on this at the November 18th, 2014 meeting and told that this needed to be kept current and up to date Once again we are under the gun to get pricing done on a short timeline because she has not performed the duties as asked.

Kelly shipped a partial load of product to Ruiz Foods on December llth, 2014. We had more product in inventory but she did not ask anyone to check inventory or notify anyone that the load would be shipping short. This forced us to ship a second partial truck the next day, effectively doubling our shipping expense.

We had more product in inventory that could have been shipped. By her own admission she made no effort to check either the system inventory level or ask someone to physically look for product.

We are getting numerous complaints from customers and trucking companies that they are not able to contact anyone, they do not get call backs and trucks are being held with no communication.

In order for Kelly to remain employed at CTI Foods the following must happen as directed:

The A---'s pricing information must be completed and turned in by the end of business each Monday for the previous week. Jason Morton is to be copied on the email to audit compliance.

The CHEP reconciliations must be completed and a confirmation email sent to Jason Morton by Monday for the previous week.

Jason will be meeting with you this week to review all job duties and determine nest steps. Following that meeting you will be required to complete the assigned tasks in a satisfactory and timely manner or be subject to further discipline up to and including termination.

Hickerson and Porter signed the warning. Arvin refused to sign it because she disagreed with it. Describing the meeting, she testified "I argued my points." In part, she attributed some of the problems mentioned in the warning to factors beyond her control. For example, in early December 2014, she was out of work for several days because she was sick

with flu. Then, when she came back to work, Arvin discovered that she no longer had access to the computerized Macola system and it took two to three days to regain access.

With respect to the delay in completing documents related to the special CHEP pallets, Arvin testified that another employee, Rayla, had told her that she, Rayla, was now assigned this task. "Therefore," Arvin said, "I considered that task off my table."

To a large extent, Arvin did not deny the problems described in the warning but instead argued that they were not her fault, caused by circumstances beyond her control. Significantly, no testimony or other evidence indicates that the subject of Arvin's union activity ever came up and I find that it did not.

Rather, the December 15 meeting focused on the work-related problems detailed in the written warning. Arvin testified that she "disputed each item" and further testified:

> And then it pretty much became a conversation between me and Dan [Monrreal]. I proceeded to tell Dan how I thought it was funny that I was getting written up twice within 3 weeks when none of these issues were ever a problem before.
>
> He told me that they were trying to figure out, you know, where some of the problems were, ways to fix these problems. And I responded to him then you should be sitting down with me and trying to work with me to figure out where the problems exist, where the gaps are, what needs to be done, and instead you're writing me up instead of trying to make this a more functional and operational department.

After receiving this final written warning, Arvin continued to work for Respondent until she resigned on April 27, 2015, without receiving any further discipline. She testified that she resigned because it "was a stressful position. It was just a mess, and no actions were being taken to correct, correct any of my issues." The General Counsel does not allege that Arvin was pressured to resign and no evidence would support such a conclusion. As noted above, the complaint does not allege a constructive discharge.

Analysis

Legal Principles

The phrase "unfair labor practice" is a term of art referring to specific types of conduct prohibited in Section 8 of the Act. Congress created the Board to enforce the provisions of the Act and did not empower it to be some more general arbiter of "fairness" in the workplace. This proceeding, therefore, focuses on these specific issues: Did the November 16 and December 13, 2014 disciplinary warnings violate either Section 8(a)(3) or (1) of the Act, as the complaint alleges?

Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act.[8] 29 U.S.C. § 158(a)(1). An employer can violate Section 8(a)(1) in a number of ways, including by making a threat to dissuade employees from engaging in protected activity or by promising a benefit if they do not.

When an employer's statement violates Section 8(a)(1) but no other section of the Act, it is termed an "independent" 8(a)(1) violation. When an employer violates some other section, this unfair labor practice necessarily interferes with, restrains, or coerces employees in exercising their Section 7 rights, so such conduct also constitutes a violation of Section 8(a)(1).

The present complaint does not allege any "independent" violations of Section 8(a)(1). Rather, it alleges that the two written warnings violated both Section 8(a)(3) and (1).

Section 8(a)(3) of the Act prohibits an employer from encouraging or discouraging membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment. See 29 U.S.C. § 158(a)(3). Therefore, I must decide whether either the November 16, 2014 written warning or the December 13, 2014 written warning, or both, constituted discrimination encouraging or discouraging union membership.

To determine whether the alleged conduct violates Section 8(a)(3), I will follow the framework which the Board established in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line* test, the General Counsel has the initial burden of establishing that employees' union activity was a motivating factor in the Respondent's taking action against them. The General Counsel meets that burden by proving union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004) (citations omitted). If the General Counsel makes this initial showing, the burden then shifts to the Respondent to prove as an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. Id. at 563; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). See *El Paso Electric Co.*, 350 NLRB 151 (2007).

Discussion

Here, the government clearly has established both that Arvin engaged in protected activity and that Respondent knew about it. She informed the Respondent of that fact on October 20, 2014, in her "section 7 letter." However, the record contains no direct evidence of animus, the third requirement.

To make the government's initial showing, the General Counsel also must prove the existence of antiunion animus. Often, an unfair labor practice complaint will allege that a

[8] Sec. 7 of the Act grants employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and also "the right to refrain from any or all of such activities. . ." 29 U.S.C. § 157.

respondent's supervisors or agents have made statements which are themselves unlawful and, accordingly, constitute evidence of unlawful motive. For example, should a respondent threaten an employee with reprisal for union activity, such a threat itself violates the Act and also constitutes evidence that the respondent harbored animus.

The present complaint alleges no such violations. The only unfair labor practices alleged in the complaint are the warnings which Respondent issued to Arvin on November 16, 2014, and December 13, 2014. Neither of these makes any reference at all to unions or union activity. Neither warning, even by implication, manifests any hostility towards unions or union activities.

Even statements which do not themselves violate the Act can reveal that an employer harbors animus. The General Counsel contends that Respondent's vice president, Hickerson, made such a remark when interviewing Webb, who had applied for a supervisory position. During closing oral argument, the General Counsel said that during this interview, Hickerson "wanted to know how in the world Webb managed to implement continuous improvement strategies at a unionized facility, which Webb had, in fact, done in his prior employment."

The General Counsel's phrasing suggests that Hickerson expressed some disbelief that continuous improvement could be accomplished at a unionize facility, but the record does not support such an interpretation. No evidence establishes that Hickerson said "how in the world" or any phrase similarly expressing incredulity and I find that he did not. Hickerson gave the following uncontradicted testimony concerning the discussion during Webb's prehire interview:

> [W]hen I interviewed him, we had talked about the fact that the facility he was at in Chicago was a unionized facility, and since I had worked in several large unionized facility, I asked him how he went about—because he wanted to talk about the work he had done in continuous improvement, and I said, well, so how do you go about doing that in a unionized facility because you have work rules and guidelines you have to go through, and I wanted to understand his thought process on how he worked within the confines of a—an organized labor agreement. That was my only conversation I'd ever had with Greg related to a labor union

Hickerson's question to Webb manifested curiosity, not animus.[9] Based on the credited evidence, I find that no manager, supervisor or agent of Respondent made a statement reflecting antiunion animus. Likewise, I did not discern in the demeanor of Vice President Hickerson, the only management witness called by Respondent, any hint of hostility towards unions or union activity.

The General Counsel also argues that I should infer the existence of animus from a statement in the handbook which Respondent issued to employees. The employee handbook, which was in effect at all times material to the complaint, included the following statement:

[9] During oral argument, the General Counsel also referred to Hickerson as "the same man who closed down a unionized facility in California and moved to Kentucky for a multi-million-dollar expansion after his company was purchased by a larger firm." However, the record includes so little information about the acquisition that inferring animus would be an exercise in reckless surmise.

D. Union-Free Environment

> We have successfully operated in a union-free environment in our facilities and we sincerely believe this is the most beneficial atmosphere for our employees, customers, and our business. We believe that employees do not need a third party to speak on their behalf because we uphold an Open Door policy where employees and management can openly discuss concerns and resolve issues quickly and fairly. Our employees have always preferred to do their own thinking, talking, and acting for themselves rather than pay someone else to think, talk, and act for them. In addition, we believe thai our customers can best be served by maintaining our union-free status

Before analyzing whether this statement constitutes evidence of animus, I first will consider whether Section 8(c) of the Act allows such analysis. Section 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Clearly, the "Union-Free Environment" statement in the Respondent's employee handbook constitutes an expression of "views, argument, or opinion" which contains no threat of reprisal or force or promise of benefit. The General Counsel has not alleged it to violate the Act and I conclude that it does not. Therefore, at first glance, the language of Section 8(c) might be read to prohibit the use of this statement as evidence of an unfair labor practice.

However, the Board draws a distinction between evidence of an unfair labor practice and evidence of *animus.* Antiunion animus is not itself an unfair labor practice but rather the motivating factor which prompts an employer to commit an unfair labor practice. Therefore, Board precedent holds that an employer's statement of opinion, even though not an unfair labor practice and even though it contains no threat of reprisal or force or promise of benefit, may still be considered as evidence of management's state of mind in making an employment-related decision.

For example, in *Affiliated Foods*, 328 NLRB 1187 (1999), the judge concluded that Section 8(c) precluded consideration of a "union-free organization" statement in the respondent's employee handbook. The Board reversed the judge, stating: "The Board has held that statements such as these, although alone not rising to the level of unfair labor practices, may still be used to show animus. E.g., *Lampi LLC*, 327 NLRB 222 (1998); *Gencorp,* 294

NLRB 717 fn. 1, 731 (1989)."[10]

The words quoted above from the Respondent's employee handbook, either considered alone or in the context of all circumstances, do not manifest any hostility to unions or union activities. By themselves, words expressing a belief that a "union-free environment" is most beneficial do not suggest any intent at all to break the law. In the context of rampant unfair labor practices not found here, it might be appropriate to infer a not-so-innocent intent hiding behind a benign face. However, in the absence of such a justifying context, to see in words expressing a lawful opinion an indication of unlawful motive would, like an inkblot test, say more about the intent of the reader than the writer.

Moreover, to infer animus from this language would implicate the First Amendment because it would burden a lawful expression of opinion, which contains no hint of threat or intimation of action, with a serious legal consequence. Contrary to the General Counsel's argument, I conclude that the "union-free environment" statement in the employee handbook does not manifest animus.

The General Counsel also contends that animus may be inferred from the timing of events. For example, in oral argument, the General Counsel stated "that on the very same day that management learned of Ms. Arvin's decision to engage in that [union] activity, it summarily fired her direct supervisor and removed from the facility a second employee."

Respondent did discharge Arvin's supervisor, Gregory Webb and also ended LeBrasseur's work on the plant on October 20, 2015, which is the same day Arvin presented Hickerson with the "section 7 letter." Respondent discharged Webb *before* Arvin decided to give management a "section 7 letter" but after Vice President Hickerson found out that Webb had knowledge of employee union activities which he had not reported to higher management.

To support the argument that Webb's discharge provides evidence of animus, the

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[10] In *Affiliated Foods*, the Board nonetheless agreed with the judge's conclusion that the government had not proven that the respondent's discharge of three employees violated the Act. The Board rested its decision on the lack of evidence establishing a link connecting the animus with the decision to terminate the employees: "The General Counsel has failed, however, to prove a nexus between the Respondent's union animus and the decisions to discharge the three employees." 328 NLRB at 1107.

However, recent Board decisions have emphasized that its *Wright Line* framework does not require the General Counsel to prove such a connection between the animus and the adverse employment action. For example, in *Libertyville Toyot*a, 360 NLRB No. 141 (2014), the Board panel majority rejected the dissenting member's assertion that, as part of the government's initial showing, the General Counsel had to prove a connection between the animus and the decision to take an adverse employment action:

> Even though there are a handful of instances in which Board panels, without purporting to modify or add to the longstanding *Wright Line* test, have in passing referred to a "nexus" element, those decisions are not to the contrary, given the overwhelming number of cases in which the Board has stated the *Wright Line* test precisely as we do here. We note that such cases do not reflect a different approach as, in none of the cases cited by our colleague, was such a "nexus," or the lack thereof, the basis for the Board's holding.

360 NLRB No. 141, slip op. at 4, fn. 10. The *Libertyville Toyota* dissent did not cite *Affiliated Foods*. My analysis in this case, following *Libertyville Toyota*, does not require a showing of nexus.

government cites *Kenrich Petrochemicals, Inc.*, 294 NLRB 519 (1989). The General Counsel contends that this case bears a "striking factual resemblance" to the present one. However, I believe that the facts in *Kenrich Petrochemicals* differ so significantly that it can be and should be distinguished.

Unlike in the present case, the General Counsel in *Kenrich Petrochemicals* took the somewhat unusual step of alleging that the employer had violated the Act, among other ways, by discharging a supervisor. Such an allegation is uncommon because, in general, someone who is a supervisor within the meaning of Section 2(11) of the Act does not meet the definition of "employee" set forth in Section 2(3). Because Section 7 grants rights only to *employees*, such rights do not extend to supervisors. Therefore, unfair labor practice complaints rarely allege the discharge of a supervisor to be violative.

However, in certain narrow circumstances, the discharge of a supervisor can violate the Act because it adversely affects rights exercised by employees. For example, a Respondent cannot lawfully discharge a supervisor because of the supervisor's refusal to commit unfair labor practices. Thus, if an employer orders a supervisor to fire an employee because of the employee's union activities, discharging the supervisor for failing to comply with this unlawful order is itself an unfair labor practice. *Trus Joist MacMillan*, 341 NLRB 369 (2004).

In *Kenrich Petrochemicals*, the judge discussed at length the reasons which the company president gave at various times for his decision to discharge a supervisor, Chizmar, and rejected most of those reasons as pretextual. The judge concluded that this respondent believed that the supervisor had been fully aware of the organizing effort, should have notified higher management, "and most importantly [should have] prevented these employees from continuing" their organizing effort. "It is well established that discharge of a supervisor for failure to prevent unionization is violative of the Act." 294 NLRB at 533 (citations omitted). The Board adopted the judge's conclusion that discharge of the supervisor violated the Act. *Kenrich Petrochemicals*, 294 NLRB 533 fn. 2.

Discharging an employee for failing to prevent unionization violates the Act because Section 7 grants employees the right to unionize, so "preventing unionization" is, by definition, interference with employees' exercise of Section 7 rights. Firing a supervisor for failing to prevent employees from exercising their statutory rights necessarily imperils those rights.

In the present case, however, no evidence suggests that Respondent discharged Webb because he failed to prevent unionization and I find that Respondent did not. The Respondent also did not discharge Webb for refusing to commit an unfair labor practice and never asked him to commit one. Similarly, Hickerson did not seek to have LeBrasseur transferred out of the plant because of any belief that LeBrasseur assisted or somehow fostered the union organizing effort. Thus, if the government had alleged that Respondent violated the Act by discharging Webb, asserting a *Kenrich Petrochemicals* theory, the evidence would not have established a violation.

In *Kenrich Petrochemicals*, the judge did find that the respondent discharged the supervisor partly because the supervisor had not reported information about the union organizing effort to higher management but did not consider this to be the "most important

part" of that respondent's motivation. However, an employer certainly has the right to expect its supervisors to report to higher management *lawfully obtained* information about union organizing activities.

Expecting supervisors to report lawfully obtained information is categorically different from telling them to engage in unlawful interrogation or surveillance. In the present case, employees approached the supervisor, Webb, and volunteered information about their union sympathies and intentions. An employer may require its supervisors to report such lawfully obtained information because management needs it for legitimate purposes, such as assuring that all of its supervisors know and comply with the Act's requirements. Thus, in the present case, upon learning that some employees were engaging in organizing efforts, the senior director of human resources took steps to inform supervisors of the "do's and don'ts."

Additionally, in the present case, the failure to tell higher management about the union effort represented only the latest instance of Webb and LeBrasseur withholding information, and, more generally, going their own way rather than functioning as part of the management team. Rather than helping increase production by improving efficiency and teamwork, the two had proven to be Johnny Appleseeds of disharmony.

After observing Hickerson and Webb as they testified and considering what they said, I conclude that Hickerson's decision to discharge Webb had its roots in a nearly visceral personality conflict. Describing this conflict and its origins requires revisiting some of the facts discussed above, but such repetition is necessary to explain why I conclude that antiunion animus played no part in the discharge decision.

As discussed above, Webb assisted Mitch LeBrasseur, the outsider from corporate level who had come to the plant for the specific purpose of finding out what the locals were doing wrong. To accomplish such a mission without harming morale and teamwork would require tact even in the best of circumstances. However, Webb and LeBrasseur came across as having more self-confidence than tact.[11]

With respect to Webb, his testimony and demeanor lead me to conclude that he did not hide the belief that he knew the most up-to-date production methods because, before coming to the Owingsville plant, he had been operations manager at a larger plant in the Chicago area.

The corporate-level managers who planned the plant expansion had intended to help that process by creating a continuous improvement *team*, but what they got was a clique. LeBrasseur and Webb operated in their own bubble, geographically distant from corporate-level management and distant, by their own choice, from plant level management. On one occasion, Webb manifested his indifference to the plant manager by changing his working

[11] With respect to LeBrasseur, Hickerson 's testimony included the following example: "Well, the first day that Mitch [LeBrasseur] walked through the door when he met [plant manager] Tony] [Walker] his opening comment to Tony was, nice to meet you, I'm here to take your job. And that did not sit well with Tony, and I asked Tony, I said, are you sure that's what he said? And he's, like, yeah, I'm sure. So I went and asked Mitch and I said, did you really say that? And he said, yeah, I said it. He goes, I was just joking. And I said, well, that's probably not the best way to start off, especially when you're coming in to do a full assessment of someone's facility, you know. . ."

hours without letting the plant manager know.

As they observed and analyzed the production processes, LeBrasseur and Webb horded their work product. Hickerson repeatedly asked LeBrasseur to provide this information to local management. According to Hickerson, LeBrasseur always agreed to do so but then failed to keep his word. LeBrasseur's lack of candor frustrated Hickerson, who felt that if LeBrasseur really wanted to help improve efficiency, he would share his findings with the people who could put them to use, the local managers.

In these circumstances, Hickerson's unhappiness that Webb and LeBrasseur had not been forthright about the union campaign reveals nothing at all about his attitudes concerning unions. The failure of Webb and LeBrasseur to report the union activity represented just one more instance in a pattern of withholding information and holding themselves aloof. Therefore, I believe the circumstances in the present case are far removed from those in *Kenrich Petrochemicals*, cited by the General Counsel, which concerned an employer, overtly hostile to union activity, punishing a supervisor for failing to prevent it.

The General Counsel further argues that "there is no dispute that within a few days of Arvin informing management about her decision to engage in union activity, Director of Human Resources Dan Monrreal sent an e-mail to the top ranking management official at the Owingsville facility, Jon Hickerson, [in] which Mr. Monrreal discussed how to handle Arvin going forward. That same e-mail also discussed union avoidance strategies."

The full text of that October 23, 2014 email is set forth above. Although the General Counsel argues that it "discussed how to handle Arvin going forward" that is not quite correct. Rather, Monrreal's email stated that he wished to "Meet with you and Tony and recap where we are at with Kelly and what are the nest steps we need to follow."

This expression of intent to discuss how to respond to Arvin's letter does not provide any information concerning the Respondent's attitude about unions and it most certainly does not indicate any intent to retaliate or discriminate against Arvin for engaging in union activities. Considering Monrreal's position as senior director of human resources, in the absence of any information to the contrary it is most reasonable to assume that he intended to advise Hickerson about the requirements of the law and how to stay within them.

Indeed, the next paragraph of the email supports precisely this conclusion. In it, Monrreal expressed the desire to meet with managers to "go over high level do's and don'ts. . ." In other words, Monrreal sought to advise the managers of what actions were legal and which were not.

The fact that the memo uses the term "basic union avoidance topics" does not indicate an intent or desire to violate the Act any more than the term "tax avoidance" means "tax evasion." It would be manifestly unfair to presume that someone intends to step outside the law simply because he wishes to discuss its boundaries.

Moreover, the General Counsel has not alleged, and the record does not establish, that Respondent ever conducted a meeting at which any of its supervisors or agents made a

statement violating Section 8(a)(1). Even the two disciplinary warnings which Respondent issued to Arvin, which are the only statements or actions the government alleges to be violative, do not mention the union or union activity at all.

In oral argument, the General Counsel further asserted that timing suggests animus: "We have less than 1 month between the date Arvin advised management of her intent to engage in union activity and the date of her first write-up."

Actually, the record indicates that the November 16, 2014 warning was not Arvin's "first write-up." She had worked at the plant 5 years and had received other warnings during this time. Moreover, although this case focuses on the nature of a warning as an adverse employment action, a warning is also a corrective measure, a method of "feedback" used to guide an employee's work performance. In that respect, a warning differs significantly from a discharge, which ends the employee's work performance.

Thus, warnings are more common than discharges and their timing depends on when a problem arises in the employee's performance. Here, Arvin has not denied the deficiencies which the warnings described. Because each of the warnings focuses on specific recent problems, I conclude that the timing does not imply animus.

The General Counsel also contends that the reasons Respondent gave for issuing the warnings were pretexts and that pretexts constitute evidence of animus. During oral argument, the General Counsel stated:

> Just as an example, the first written warning that was issued on November 18, 2014 included a reprimand because Arvin had told a customer that she would report CHEP pallets, time permitting.
>
> Now, there's no dispute about that, that Arvin made this statement. It's in an e-mail, and the e-mail's in the record. The question isn't whether she said it, or she said it or whether she should have said it. The question is whether she should have been written up for it, whether she would have been written up for it if she hadn't just told her employer that she was looking to start a union at their facility

The General Counsel poses two separate questions: (1) Whether Arvin should have been written up and (2) whether she would have been written up if she had not announced her union activities.

With respect to the first question, it should be stressed that the Board does not make judgments concerning the fairness, propriety, or wisdom of an employer's personnel decision. The Board only has authority to inquire into the motivation of the decision, that is, to determine whether animus was a factor.

At the same time, the Board may draw on its eight decades of experience in industrial relations to reach an opinion regarding how employers typically or customarily would react when confronted with such a situation. Almost all employers would consider it unacceptable for an employee to tell a customer that she would attend to the customer's request "time

permitting" or that she would do the best she could. Such expressions of indifference to the customer's needs would almost certainly vex the customer, and might well cause the customer to go elsewhere.

Accordingly, I conclude that there is nothing unusual about an employer issuing a warning in such circumstances. As to the second question, whether the Respondent would have issued a warning to Arvin in the absence of her Section 7 letter, that question essentially mirrors a respondent's rebuttal burden under the *Wright Line* framework. Once the General Counsel has made an initial showing, a respondent then may rebut the showing by establishing that it would have taken the same action in the absence of knowledge of protected activity. Such a question does not arise unless the General Counsel first meets the government's initial burden, so it would be premature to reach it at this point in the analysis.[12]

More generally, it is difficult to find that the warnings were pretexts when Arvin, the recipient of the warnings, has admitted the problems which the warnings sought to correct. Finding that the warnings were pretexts would necessitate a conclusion that the Respondent would not have tried to correct the problems in Arvin's work performance if she had not been involved in union activities. Such a conclusion would be incompatible with the evidence.

The record clearly shows the intensity and drive of the new owners. In their push for greater efficiency and productivity, even the plant manager lost his job. It is inconceivable that management, becoming aware of a production problem, would simply tolerate it without taking corrective action.

During oral argument, the General Counsel provided an exhaustive, indeed microscopic analysis of various emails, argued that certain problems mentioned in the emails were not Arvin's fault, and argued that Respondent issued the warnings without adequately investigating. Whatever suspicion this argument might raise in the mind of an inveterate conspiracy theorist, it leaves me unpersuaded.

At one point, the General Counsel argued that "it's pretty clear that he's setting her up here" and that "He's looking for a paper trail." However, if the Respondent were trying to build a case against Arvin to justify her discharge, why did such discharge never occur? After receiving the December 13, 2014 final warning, Arvin worked another 4 1/2 months without receiving any further discipline and then quit voluntarily. The logical conclusion is that the warning had its intended effect, resulting in an improvement in Arvin's performance.

Moreover, the warnings, which focused exclusively on work performance problems logically could not constitute a "shot across the bow" to discourage further union activity because they did not even mention union or union activity.

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[12] The General Counsel argued that the "fact that the Respondent offered no evidence that any other employee has ever been written up for a similar offense speaks volumes." However, the *Wright Line* framework does not call upon a respondent to produce such evidence of similar treatment, which is rebuttal evidence, until after the government has made its initial showing. That initial showing includes proof of animus. An absence of rebuttal evidence does not prove an initial element which must be established to create the rebuttal burden.

In considering the General Counsel's argument that Respondent did not perform an adequate investigation, I note that neither the Act nor the Board requires any particular type of investigation. Additionally, Arvin admitted most of the deficiencies described in the warnings, although she did not take responsibility for those deficiencies. However, part of the purpose of a warning is to impress upon the employee the need to take responsibility, so that the problem does not recur in the future. Indeed, the new owners had instituted an intense production system which depended on employees taking more responsibility than they had in the past, and working closely as a team.

The General Counsel also argues that Respondent's failure to call certain witnesses warrants drawing an adverse inference. However, until the government makes its initial showing, no burden shifts to the Respondent to present a rebuttal. Moreover, because an adverse inference weighs as a substitute for evidence, such an inference should be drawn only when clearly warranted. It is not warranted here.

In seeking to satisfy the animus requirement, the General Counsel parses the evidence in minute detail, but essentially, the government contends that Respondent did not treat Arvin fairly and from this unfairness I should infer animus. However, the two are not the same.

It concerns me that, simply by announcing to management that she was engaging in union activities, an employee with admitted performance problems has caused the government to place under a microscope the everyday supervisory activity of correcting problems and informing employees when work does not meet its standards. If there were any credible evidence of animus, or if there were any other alleged unfair labor practices, such scrutiny might well be justified. In the present case, however, the Respondent held no hostility towards unions and the government does not even allege that it committed other unfair labor practices. Nonetheless, the government required it to litigate this matter at considerable cost, with the remainder of the bill footed by taxpayers.

If an employee could immunize herself from being supervised by giving her employer a "Section 7 letter," it would put the Board in the business of second-guessing countless everyday supervisory decisions. However, the Act does not turn a letter announcing the intent to engage in union activity into an invisibility cloak.

In sum, I conclude that the General Counsel has failed to prove that the Respondent harbored animus. Therefore, the government has not made the required initial showing. Therefore, I recommend that the Board dismiss the complaint in its entirely.

In view of this conclusion, it is not necessary to address in detail a motion made by Respondent, which contends that the General Counsel had failed to produce the material required by Section 102.118 of the Board's Rules and Regulations, and that an adverse inference is warranted because of this asserted failure to comply with this "Jenck's rule." However, I note that after considering the motion and reviewing the relevant evidence, I conclude that the General Counsel did not act improperly.

Conclusions of Law

1. The Respondent, Custom Food Products, LLC, a wholly-owned subsidiary of CTI Foods, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, United Food and Commercial Workers Union, Local 227, is a labor organization within the meaning of Section 2(5) of the Act.

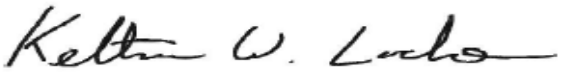
3. The Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[13]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 4, 2015



Keltner W. Locke
Administrative Law Judge

[13] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.